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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 2.

NEW WORLD LIFE INSURANCE COMPANY, a Corporation,
*Petitioner,*

v.

THE UNITED STATES.

**Petitioner's Brief in Opposition to Respondent's Motion to Dismiss Writ of Certiorari.**

**Petitioner's Motion for Leave to File Waiver of Statute of Limitations and Consent to Judgment.**

**Waiver of Statute of Limitations and Consent to Judgment.**

WALTER E. BARTON,
Investment Building,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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**On Petition for a Writ of Certiorari to the United States Court of Claims.**

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## PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI.

The respondent has filed a motion to dismiss the writ of certiorari herein on the ground that the question presented by the writ is now moot, and that the judgment of the Court below would remain unchanged regardless of how this Court might decide the pending issue. (Resp. Motion, 1.)

The petitioner sued in the Court of Claims for a refund of income taxes for the years 1929 to 1932, inclusive, on the ground that petitioner was entitled to a deduction for in-

vestment expenses paid. (R. 3, 6, 9, 13.) The respondent raised the question of petitioner's right to a deduction of four per cent[1] of the mean of Reserves for Total and Permanent Disability Benefits, Active Lives and Disabled Lives, which deduction petitioner had taken in computing the amount of refund due. The respondent asked the Court of Claims to hold that such reserve deduction was not allowable in determining the amount of refund due, but did not ask for any affirmative judgment for income taxes underpaid, on account of the fact that the statute of limitations barred the collection thereof. (R. 17, 47.) The Court of Claims held that said investment expenses were not deductible, and also held that said reserve deduction was not allowable, but did not render affirmative judgment in favor of the respondent due to the statute of limitations. (R. 32, 45, 60.)

The petitioner has another case pending in the Court of Claims, New World Life Insurance Company v. The United States, No. 44580, involving the question of whether petitioner is entitled to deductions of $5,376.94 and $5,417.88 for the years 1933 and 1934, respectively, representing 3¾ per cent of the mean of Reserves for Total and Permanent Disability Benefits, Disabled Lives.

If the writ were to be dismissed in the instant case on the ground that the question presented is moot, and the Court of Claims were to be reversed on that issue in accordance with the usual procedure of this Court in such cases, the petitioner and the respondent in all probability would be compelled to litigate anew in the Court of Claims and in this Court an identical question now presented by the present writ; viz., whether petitioner is entitled to a deduction of 3¾ per cent[2] of the mean of Reserves for Total and Permanent Disability Benefits, Disabled Lives, a procedure expensive to the petitioner and to the Government, as well as an unnecessary burden upon the Court of Claims

[1] 3¼% for 1932.

[2] Or 4%.

and this Court. Furthermore, the question is a recurring one from year to year not only to the petitoner, but also to practically every life insurance company in the United States,[3] inasmuch as there has been no material change in the law in respect of such reserve deductions since 1921.

This unnecessary litigation and expense would be the probable result of this Court's dismissing the writ and reversing the Court of Claims on the reserve fund deduction issue in the instant case, for the result would be that there would be no conflict upon which to base certiorari (Rule 38, par. 5), inasmuch as all other decisions of United States Circuit Courts of Appeals to date, involving the same question, have held that such reserve deduction is allowable to a life insurance company. (*Com.* v. ***Pan American Life Insurance Co.*** (C. C. A. 5) 111 F. (2d) 366, Government's petition for certiorari pending, No. 264; *Com.* v. ***Oregon Mutual Life Insurance Co.*** (C. C. A. 9) 112 F. (2d) 468, Government's motion for 60-day extension of time from September 12, 1940 to file petition for certiorari granted by this Court on August 22, 1940; and ***Monarch Life Insurance Co.*** v. *Com.* (C. C. A. 1) 113 F. (2d) —.) In fact, the respondent recognizes the probability of this Court's denying the Government's petition for certiorari in the *Pan American Life Insurance Company* case in the event of the dismissal of the writ in the instant case. (Resp. Motion, p. 5, fn. 3.) Furthermore, petitioner is informed that the insurance company proposes to file a brief in opposition to the Government's petition for a writ of certiorari in that case, on the ground that there will be no conflict, if this Court should dismiss the writ in the instant case.

Petitioner respectfully submits that the pendency in the Court of Claims of petitioner's suit for a refund of income taxes for the years 1933 and 1934 involving a question presented in the present writ is sufficient ground for this Court

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[3] Best's Life Reports for 1938 show that there are at least 300 life insurance companies doing business in the United States.

to deny the respondent's motion to dismiss the writ and to proceed to hear the within cause on the merits and to decide the question involved. If, however, petitioner be mistaken in this, petitioner respectfully submits its Motion for Leave to File the Attached Waiver of Statute of Limitations and Consent to Judgment for the year 1931, and if this Court should grant said motion, there would be an unquestioned controversy between the parties, which this Court might hear and decide, and thereby obviate further litigation between them in respect of the identical issue.

The question of petitioner's right to a deduction in respect of said reserve funds was not moot in the Court of Claims, as suggested by respondent in its motion to dismiss the writ (Resp. Motion, p. 3); and did not become moot in any event before this Court denied the petition for a writ of certiorari in respect of the investment expense question. Accordingly petitioner did not consider it appropriate to file a Waiver of the Statute of Limitations and Consent to Judgment in the Court of Claims.

That anyone other than the Government[4] entitled to rely upon the statute of limitations may waive it is well established by the decisions of the State and Federal courts. (*Randon* v. *Foby*, 11 How. 393; *Sanger* v. *Nightingale*, 122 U. S. 176; *Allen* v. *Smith*, 129 U. S. 465; 37 C. J. 721; 17 R. C. L. 881.) Petitioner, therefore, submits that it has the right to file the attached Waiver of the Statute of Limitations and Consent to Judgment at this time.

In the event that this Court should deny petitioner's Motion for Leave to file Waiver of Statute of Limitations and Consent to Judgment and grant respondent's motion to dismiss the writ herein on the ground that the question presented is moot, petitioner respectfully asks the Court to reverse the Court of Claims on the question of the reserve fund deduction in accordance with the established practice of this Court in such cases. (*Leader* v. *Apex Hos-*

[4] In *Finn* v. *U. S.*, 123 U. S. 227, it was held that officers of the United States may not waive the statute of limitations.

*iery Co.*, 302 U. S. 656; *Woodering* v. *Clarksburg Bridge Company*, 302 U. S. 658; *Alejandrino* v. *Quezon*, 271 U. S. 528; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218; *Heitmuller* v. *Stokes*, 256 U. S. 359; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Public Utilities Comrs.* v. *Compania General de Tabacos*, 249 U. S. 425; *Berry* v. *Davis*, 242 U. S. 468, 470; *U. S.* v. *Hamburg Amerikanische Co.*, 239 U. S. 466.)

Unless the Court of Claims is reversed on the reserve fund deduction issue, the petitioner may be bound in New World Life Insurance Company v. U. S., No. 44580, now pending in the Court of Claims, and also in subsequent taxable years, by the decision of that Court in the instant case, on the ground of *res judicata*, notwithstanding three Circuit Courts of Appeals have decided the identical question differently from the decision of the Court of Claims. Manifestly this would be unjust to the petitioner.

Respectfully submitted,

WALTER E. BARTON,
Investment Building,
Washington, D. C.
*Counsel for Petitioner.*

October, 1940.

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## PETITIONER'S MOTION FOR LEAVE TO FILE WAIVER OF STATUTE OF LIMITATIONS AND CONSENT TO JUDGMENT.

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

COMES Now the petitioner, New World Life Insurance Company, and respectfully moves this Honorable Court for leave to file the following Waiver of Statute of Limitations and Consent to Judgment for the reasons stated in the foregoing Brief in Opposition to Respondent's Motion to Dismiss Writ of Certiorari.

WHEREFORE, petitioner prays that its motion may be granted.

Respectfully submitted,

WALTER E. BARTON,
Investment Building,
Washington, D. C.,
*Counsel for Petitioner.*

October, 1940.

## WAIVER OF STATUTE OF LIMITATIONS AND CONSENT TO JUDGMENT.

KNOW ALL MEN BY THESE PRESENTS: That the New World Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and having its principal place of business in the City of Seattle in said State, does hereby waive the statute of limitations against the collection of income taxes in the amount of Fifty Dollars ($50.00) for the calendar year 1931;

And in the event that the Supreme Court of the United States in New World Life Insurance Company, Petitioner v. The United States, No. 2 October Term, 1940, in the Supreme Court of the United States, shall affirm the Court of Claims on the merits, and shall hold that the said New World Life Insurance Company is not entitled to a deduction of four per cent of the mean of Reserves for Total and Permanent Disability Benefits, Active Lives and/or Disabled Lives, held at the beginning and end of the taxable year 1931, the said New World Life Insurance Compony hereby consents to the entry of judgment in favor of the United States for income taxes in the amount of Fifty Dollars ($50.00) for said calendar year 1931.

IN WITNESS WHEREOF, the said New World Life Insurance Company has caused its corporate name to be hereunto signed by its Vice-President and its corporate seal to be hereunto affixed by its Secretary this 2nd day of October, A. D. 1940.

NEW WORLD LIFE INSURANCE COMPANY,

By EDWARD J. O'SHEA,
*Vice-President.*

ATTEST:

RUSSELL C. BURTON,
*Secretary.*

State of Washington, County of King, ss:

On this 2nd day of October, A. D. 1940, before me personally appeared Russell C. Burton, to me personally known, who, being by me first duly sworn, did depose and say that he is the Secretary of the NEW WORLD LIFE INSURANCE COMPANY; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said Russell C. Burton acknowledged said instrument to be the free act and deed of said corporation.

CECELIA MCGRATH,
*Notary Public.*

(Seal)

My Commission Expires: May 23, 1942.